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Supreme Court of the United States

OCTOBER TERM, 1943

No. 592

ALLEN CALCULATORS, INC.,
Appellant,

vs.

THE NATIONAL CASH REGISTER COMPANY
and THE UNITED STATES OF AMERICA,
Appellees.

BRIEF FOR APPELLEE, THE NATIONAL CASH REGISTER COMPANY

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Washington, March 21, 1944.

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Statement.

Appeal from an order (R. 16) of the District Court of the United States, Southern District of Ohio, Western Division, filed November 16, 1943, overruling a motion of the appellant, Allen Calculators, Inc., for leave to intervene and file an answer in a proceeding pending in the said court under a provision of a final decree entered February 1, 1916, in the case of United States of America, Plaintiff, vs. The National Cash Register Company, et al., Defendants (In Equity No. 6802).

The appellee, The National Cash Register Company (hereinafter referred to as "National"), filed in this Court, with a statement opposing jurisdiction, a motion to dismiss or affirm. By an order filed February 7, 1944 (R. 108), this Court postponed further consideration of the question of jurisdiction to the hearing on the merits and transferred the case to the summary docket.

The Proceeding in which Intervention was Sought.

The appellant, Allen Calculators, Inc., made its motion for leave to intervene (R. 55) in a proceeding instituted by the appellee, National, under the provisions of Article Second (p) of a final decree entered on February 1, 1916 in a suit in equity (No. 6802) entitled "The United States of America, Plaintiff, vs. The National Cash Register Company, et al., Defendants".

That suit was one under the Sherman Anti-Trust Act; and the final decree (R. 1-6), which was entered on consent, found that National and certain of the other defendants had combined to restrain and had attempted to monopolize interstate and foreign trade and commerce in cash registers in violation of Sections 1 and 2 of the Anti-Trust Act of July 2, 1890, by means of certain acts, enumerated in Article Second of the decree, which were thereby enjoined. The last paragraph of Article Second of the decree enjoined National, as follows:

> "(p) From acquiring ownership or control directly or indirectly, by means of stock ownership or otherwise, of the whole or an essential part of the business, patents, or plant of any competitor engaged in the manufacture or sale of cash registers or other registering devices in interstate or foreign commerce; Provided, that in case any such acquisition is desired, a petition may be presented to this Court stating the reasons therefor, and if the Court upon investigation into all the circumstances of the case and after notice of not less than sixty days to the Attorney General shall determine that such business or patents or plant so desired to be acquired will supplement the plant, patents, machines, or facilities of the defendant corporation and that the acquisition thereof is desired for that purpose and will not substantially lessen competition, then jurisdiction is reserved to pass an order permitting the same upon such terms and conditions as may be right."

Under the provision of the decree above quoted, National, on August 30, 1943, filed a petition (R. 6-12) in which it asked that it be permitted to acquire all or not less than 95% of the common stock and all or not less than 50% of the preferred stock of Allen-Wales Adding Machine Corporation (hereinafter referred to as "Allen-Wales"), on the ground that such acquisition would supplement the plant, patents, machines and facilities of the petitioner and was desired for that purpose and would not substantially lessen competition (R. 12).

A copy of the petition with notice of filing was served on the Attorney General of the United States on or about September 2, 1943 (R. 13). The answer of the United States to the petition, requesting that the same be denied, was filed on November 11, 1943 (R. 14-16).

The proceeding came on for hearing in the District Court on November 15, 1943. The appellant presented its motion for leave to intervene at the opening of the hearing, having served its notice of motion (R. 55) and proposed answer to the petition (R. 56-64), verified on that date (R. 64), on the attorneys for the Government and National shortly before the court convened (R. 29).

Although the court originally permitted the intervention "conditionally" (R. 30) and allowed counsel for the appellant to make an opening statement and to take some part in the proceedings (R. 30-36), it ruled subsequently that the appellant would not be allowed to intervene (p. 40). At the opening of the second day of the hearing, on November 16, the court announced that it would enter an order denying intervention, without stating therein the reasons for doing so (R. 41-44); and later, on the same day, the order appealed from was filed (R. 16).

In the course of the hearing, counsel for the Government, representing the general public, raised every material point, having any basis in fact, suggested by the appellant as a ground for denying National's application for permission to acquire the Allen-Wales stock. The issues were argued at length by counsel for the Government and counsel for National and were carefully considered by the court.

On December 7, 1943, an order of the District Court was filed (R. 17-22), authorizing and permitting National to acquire the assets and business of Allen-Wales, through the purchase of all or part of its outstanding stock, with the proviso that such acquisition should bind National to the performance of certain conditions. The order also provided that jurisdiction was retained to enforce or modify the same and to enable the Attorney General or the petitioner (National) or any dealer or distributor of Allen-Wales to make applications to the court in connection therewith, and it directed that representatives of the Department of Justice should have access to the books and records of National and should be entitled to interview its officers and employees and to receive reports necessary for the enforcement of the order, and it also provided that the final decree of February 1, 1916 should remain in full force and effect.

In its order of December 7, 1943, the District Court made specific findings with respect to the business of National and Allen-Wales (R. 18-19). These included findings that more than 94% of the business of Allen-Wales consisted of the manufacture and sale of adding machines; that National had not engaged in the manufacture or sale of adding machines (except for an insignificant number of converted accounting machines), while its principal competitors in cash registers and accounting machines did manufacture and sell adding machines; that the competition between the accounting machines and cash registers of National and the 5.8% of the business of Allen-Wales in commercial bookkeeping machines and combination adding-cash drawer machines was not substantial; and that the acquisition by National of the stock of the Allen-Wales would not substantially lessen competition upon compliance with the conditions contained in the order.

The conditions referred to (R. 19-21) are elaborate and provide, in substance, that all independent dealers and distributors of products of Allen-Wales shall continue to be permitted to handle such products, as if Allen-Wales were continuing to exist as an independently owned corporation, until at least January 1, 1950, that parts for repairing or

servicing such products shall be made available to them, until at least January 1, 1954, and that no unfair or unreasonable discrimination shall be practiced against such dealers and distributors.

Summary of Argument.

The appellee contends that the order appealed from should be affirmed or the appeal dismissed, for the following reasons:

I. The granting or refusal of the application to intervene was within the discretion of the District Court, because the appellant was not entitled to intervene as of right under Rule 24(a) of the Federal Rules of Civil Practice.

(1) There was no statute conferring an unconditional right to intervene;

(2) The representation of appellant's interest by the Government was adequate; the Attorney General raised all material points suggested by appellant;

(3) Appellant would not be bound by a judgment;

(4) There was no property in the custody of the court or an officer thereof;

(5) The application was not timely;

(6) Case of Missouri-Kansas Pipe Line Co. v. United States (312 U. S. 502) is not applicable;

(7) There was no claim made in the court below that intervention was a matter of right.

II. The action of the District Court in denying intervention was correct and involved no abuse of discretion. Full consideration was given to every material issue suggested by appellant.

III. Jurisdiction is lacking because the order denying intervention, being discretionary, was not appealable.

POINTS.

FIRST

Appellant not entitled to intervene as of right under Rule 24 (a) of the Federal Rules of Civil Practice. The order was discretionary.

The appellant contends (Brief, pp. 15-24) that it was entitled to intervene as a matter of right under Rule 24(a) of the Rules of Civil Practice. It did not make this contention in the lower court.

Rule 24 provides as follows, with respect to intervention of right:

> "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof."

The appellant does not bring itself within any of the provisions of Rule 24(a) relating to intervention as of right.

1. Right to intervene not conferred by statute.

There is no statute of the United States which conferred on the appellant "an unconditional right to intervene" in the proceeding in the lower court.

The only statute the appellant is able to suggest as applicable is Section 16 of the Clayton Act giving a right to injunctive relief against injury which may be sustained by a threatened violation of the anti-trust laws.

Appellant's argument (Brief, pp. 16-17, 20-21), so far as it is understandable to us, seems to be that, because Section 16 of the Clayton Act provides for injunctive relief, it should be construed as permitting anyone who asserts an interest in an injunction obtained by the Government to participate in any proceedings relating to the enforcement or modification of such injunction. Since the Clayton Act contains no language remotely justifying that construction, appellant's theory appears to be that the statute affords inadequate protection and that, therefore, the Court should read into it a new provision which Congress has not seen fit to enact. In other words, "There ought to be a law".

It is submitted that this theory is far from satisfying the requirement in Rule 24(a)(1) of "a statute of the United States (which) confers an unconditional right to intervene".

Absolute proof that Congress did not intend that Section 16 of the Clayton Act should confer upon appellant, or any one similarly situated, an absolute right to intervene in a proceeding in which the public as a whole was represented by the Attorney General, is found in Section 11 of that Act. This section confers upon the Federal Trade Commission, and other appropriate administrative bodies, the authority to enforce compliance with certain sections of the Act through proceedings to show cause why a "cease and desist" order should not be entered. This section specifically provides that "any person may make application, and, upon good cause shown, may be allowed by the Commission or Board, to intervene and appear in such proceedings". Having specifically provided for "permissive" intervention by private parties in proceedings before administrative tribunals under Section 11, it seems clear that the failure of Congress to provide for intervention in actions brought by the Attorney General in District Courts under Section 15, or to make any reference to intervention in Section 16, denies the existence of any such right.

2. Representation of Appellant's interest by Government was adequate.

Appellant's principal argument for the applicability of Rule 24(a) relates to subdivision (2) "when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action".

On this point, the appellant is forced to argue (Brief, pp. 21-3) that, as a competitor of Allen-Wales and National, it had an interest in the proceeding, representation of which by the United States was or might be inadequate.

If this contention were sound, any private person or corporation could intervene as a party in any suit brought by the United States under the Anti-Trust Laws, on the mere assertion that the intervenor was a competitor and that its interests might be affected and might not be adequately represented by the Government. And such intervention would have to be allowed as a matter of right. It would not be a matter of discretion for the trial court.

Although nothing was brought to the attention of the trial court to indicate that the interests of the appellant, as well as the interests of the public generally, would not be adequately represented by the Government, it is apparent from the statements of the court hereinafter referred to (*post*, pp. 18-19) that it did consider this question and came to the conclusion that the appellant had no special interest in the proceeding distinguishing it from numerous other competitors in the field of business machines and office equipment and that the Government had made a thorough preparation for the hearing and a complete and adequate presentation of all facts and points of law which had any bearing on the propriety of permitting National to acquire the stock of Allen-Wales.

Although only a small part of the testimony and only one of the numerous and voluminous exhibits introduced by the parties, and a portion of another, appear in the printed record on this appeal, the record contains ample

material to demonstrate that the case was fully presented to the court. The elaborate findings and conditions contained in the District Court's order granting the petition of National (R. 17-22) show that the court gave the matter its most careful consideration and endeavored to give the fullest protection to the public and to the so-called "independent dealers and distributors" who might be affected.

It is not seriously suggested that the Anti-Trust Division of the Department of Justice is not competent to represent the public interest in an anti-trust suit or in a proceeding growing out of a decree in an anti-trust suit.

The appellant, however, attempts to make some point (Brief, pp. 9-10, 18) of a remark by one of the Assistants to the Attorney General, in his closing argument, that the Government did not regard itself as an "adversary" (R. 86). This "interpolation", as the Assistant to the Attorney General described it, must be read in connection with his entire closing argument (R. 85-104), and is hardly consistent with the position there taken by the Government nor with the answer filed by the Government (R. 14-16), which requested that the petition of National be denied.

The attorneys representing the Government contended strongly throughout the hearing that the acquisition of Allen-Wales by National would tend to suppress competition in the office equipment business "at the distribution level" and would eliminate substantial "potential" competition between National and Allen-Wales. These contentions received the careful consideration of the court, in the light of the evidence presented, and are covered by the findings and other provisions in the order which was subsequently entered (R. 17-22).

The only specific criticism made by the appellant of the Government's presentation of the case is the almost frivolous one that it introduced in evidence a large number of letters written to the Department of Justice by dealers and distributors of Allen-Wales products, instead of calling them as witnesses or taking their depositions (Brief, pp. 6, 22). Three of these letters appear in the record of this

appeal, together with the questionnaire sent out by the Department of Justice to which they were replies (R. 49-54). There were about twenty-two such letters which the Government asked the court to examine and which the court promised to read with care (R. 93), although the court originally expressed some hesitation about receiving them (R. 38-9). However, National waived any objection to these letters on the ground of hearsay or incompetency, reserving objection on the ground of irrelevancy and immateriality and the right to comment on their value because of lack of opportunity for cross-examination and in so far as they might contain expressions of opinion (R. 37, 47).

Obviously the Government was able, by this means, to present a quantity of material to the court, much of it the expression of opinion adverse to the position of National, which could not have been obtained by the examination of a few witnesses or without an inordinate expenditure of labor and money in taking depositions. The appellant does not suggest how it could have made a better presentation in this respect.

3. Appellant not "bound by a judgment."

In attempting to bring itself within Rule 24(a)(2) as having a right to intervene, the appellant is, of course, also obliged to argue that it "is or may be bound by a judgment in the action" (Brief, pp. 16-17, 22).

There is no basis for that contention. Many members of the general public are affected in one way or another by decisions in suits to which they are not parties, particularly anti-trust suits, suits affecting the rates of public utilities, and similar types of litigation. That, however, does not give individual rate payers or persons who may be affected by the result of anti-trust suits the right to intervene and become parties to such suits. In cases where the public interest is represented by a governmental officer or commission, charged with enforcing the law or protecting the public interest, intervention by private parties, even though they may have a substantial interest in the result

of the litigation, has uniformly been denied. Representation by the governmental authorities is presumed to be adequate, in the absence of gross negligence or bad faith on their part.

In re Engelhard, 231 U. S. 646, 651;
City of New York v. *Consolidated Gas Co.*, 253 U. S. 219;
City of New York v. *New York Telephone Co.*, 261 U. S. 312.

The appellant is in the same position as any other member of the public, including the numerous other manufacturers, dealers and distributors of office machines and equipment who are not, and who have not sought to become, parties to the suit. All such persons, including the appellant, retain their full rights under Section 16 of the Clayton Act, upon a proper showing of special interest, to obtain injuctive relief against threatened loss or damage by violation of the anti-trust laws. Furthermore, they retain their full rights under Section 4 of the Clayton Act to sue for treble damages, if able to prove that they have been damaged by a violation of the law.

As this court has reiterated time and again, the fundamental purpose of the Sherman and Clayton laws was to protect the public as a whole against monopolies. Although appellant may feel that its interest in this acquisition is greater than that of many other members of the public, it has no personal or private interest in the matter other than its interest, as one particular member of the public, in being protected against monopolies.

Section 15 of the Clayton Act specifically provides that "it shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations". In the case at bar, the Attorney General, acting on behalf of the public as a whole, in performance of the duty imposed upon him by statute, sought to prevent a specific act, namely, the acquisition of Allen-Wales stock by National. The appel-

lant has no legitimate ground for complaint merely because it, as one member of the public, is thereby deprived of seeking to prevent the identical act through the injunctive relief provided by another section of the same statute.

City of New York v. *New York Telephone Co.*, 261 U. S. 312.

4. **No property in the custody of the court.**

It is also clear that the appellant is not "so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or an officer thereof".

Appellant's brief does contain an argument to the effect that this provision of the Rule is applicable (Appellant's Brief, pp. 16, 23-4); but it is submitted that this contention is too far-fetched to deserve serious consideration.

The proceeding in the District Court was instituted by National to obtain permission to acquire the stock of Allen-Wales; but that stock was not, and never has been, in the custody of the court or of an officer thereof. The owners of the stock had complete control of it and could dispose of it as they pleased; but National believed that it should not purchase the stock, without permission of the court, because of the injunctions against its doing certain acts contained in the decree of February 1, 1916.

5. **Application not "timely."**

Under Rule 24(a) (and also under Rule 24(b)) an application for intervention must be "timely".

The application of the appellant to intervene in this proceeding was made at the opening of court on November 15, 1943. The petition of National was filed on August 30, 1943, and notice of such filing was sent to the Attorney General on that date. Notice of the application to intervene was not served on the appellees until they were in the court room prepared to proceed with the hearing (R. 29).

The remarks of the District Court, hereinafter referred to (*post*, p. 18) show that consideration was given to the

tardiness of the application and the inconvenience and damage that might be caused to National, as well as to stockholders of Allen-Wales who had contracted to sell their stock, by delays resulting from permitting another party to intervene at the last moment.

National and its attorneys had furnished a great quantity of material bearing on the case to the Attorney General, prior to the hearing. In order to expedite the hearing, the attorneys for National and the Assistants to the Attorney General in charge of the case had prepared a stipulation covering many facts which were not in dispute, including numerous charts and tables showing production and sales figures in the office equipment business (R. 45-7).

At the very outset of the taking of testimony, when this stipulation was presented to the court, counsel for appellant interjected himself into the proceedings and stated that he had not seen the stipulation and wanted to examine it before it was marked in evidence (R. 35). Counsel for National remarked that this was why they were objecting to intervention. The court then announced that a recess would be taken shortly, at which time counsel could examine the stipulation. It is apparent that this incident quite properly influenced the learned District Judge in coming to the conclusion that intervention by the appellant would merely delay the proceedings and would serve no useful purpose.

In appellant's brief an attempt is made to excuse the tardiness of the application by saying that the answer of the Government to the petition was not filed until November 11. This is entirely immaterial, because the filing of an answer by the Government is not contemplated by the decree.

It is not stated that the appellant had not heard of the proceeding before that date; and it appeared that its attention had been called to the matter by the Anti-Trust Division of the Department of Justice many weeks before, because the Government, among its exhibits, introduced statements obtained from all companies in the adding machine field (which included appellant) in regard to their sales organizations and methods of distribution (R. 39, 41).

6. Missouri-Kansas Pipe Line Co. v. United States (312 U. S. 502).

In its effort to support the contention that intervention was a matter of right, even though none of the provisions of Rule 24(a) is applicable, the appellant relies on the decision of this Court in *Missouri-Kansas Pipe Line Co.* v. *United States* (312 U. S. 502).

That decision, however, was based squarely on the express provisions of the decree in the Government's anti-trust suit against Columbia Gas & Electric Corporation, which specifically gave certain rights to the Panhandle Eastern Pipe Line Company and further provided that "Panhandle Eastern, upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by § IV hereof". The application to intervene by Missouri-Kansas Pipe Line Co. (referred to in the opinion as "Mokan"), a stockholder of Panhandle Eastern, was made on behalf of Panhandle to enforce those rights; and this Court held that intervention was a matter of right under the terms of the decree, without regard to the provisions of Rule 24(a). In the opinion of the Court, Mr. Justice FRANKFURTER said (pp. 506, 508):

> "All of these arguments misconceive the basis of the right now asserted. Its foundation is the consent decree. We are not here dealing with a conventional form of intervention, whereby an appeal is made to the court's good sense to allow persons having a common interest with the formal parties to enforce the common interest with their individual emphasis. Plainly enough, the circumstances under which interested outsiders should be allowed to become participants in a litigation is, barring very special circumstances, a matter for the nisi prius court. But where the enforcement of a public law also demands distinct safeguarding of private interests by giving them a formal status in the decree, the power to enforce rights thus sanctioned is not left to the public authorities nor put in the keeping of the district court's discretion.
>
> * * * * *

Therefore, the codification of general doctrines of intervention contained in Rule 24(a) does not touch our problem. And since the protection afforded Panhandle by § IV of the decree could only be secured by the remedy designed by § V, to wit, active participation in the suit, the denial of that protection is a definitive adjudication, and so appealable."

It should be noted that Mokan had previously made two applications to intervene on its own behalf, as a stockholder of Panhandle. Those applications were denied and appeals from the denials were dismissed by the Circuit Court of Appeals (108 F. (2d) 614), and this Court denied certiorari (309 U. S. 687). In referring to these earlier decisions, Mr. Justice FRANKFURTER said (p. 508):

"The denials are now urged as res judicata. But they were a rejection of Mokan's attempt to intervene in its own behalf. In neither instance was the relief denied deemed a mode of enforcing Panhandle's rights under §§ IV and V of the decree."

There was, of course, nothing in the decree in the National Cash Register case which gave any specific rights to the appellant; nor was there any provision that it might become a party to the suit for the purpose of enforcing such rights. The appellant was not even in existence when the decree against National was entered on February 1, 1916 (R. 75).

In appellant's brief (pp. 2-3) there is an attempt to extend the principle of the *Pipe Line* case to embrace the proposition that any person, not a party to the original anti-trust suit, should be granted intervention, as a matter of right, if the decree was designed to safeguard the interests of such person.

Clearly this Court did not intend to establish any such principle. It would mean that, in practically every suit brought by the United States to enforce the anti-trust laws, private corporations and individuals could intervene, as a matter of right, upon the mere assertion that their eco-

nomic interests might be affected in some way by the result of the suit.

Neither Rule 24(a) nor the decision of this Court in the *Missouri-Kansas Pipe Line* case has changed the well-settled principles as to when intervention must be allowed or may be permitted in a suit in equity. In discussing Rule 24, Dean Clark, Reporter to the Supreme Court Advisory Committee on the new Rules, is quoted as saying

> "Intervention is another case where, by stating the rule more in detail, we have tried to cover the existing law without very substantial change, but more by way of clarification".

("Federal Rules of Civil Procedure; Proceedings of Institute; Washington and New York, 1938," published by the American Bar Association, p. 67.)

It has long been recognized that the granting or denial of an application by someone who was not an original party, to intervene in a suit in equity, is within the discretion of the trial court, except where intervention is a matter of right under express provisions of a statute or a rule of court.

Ex parte Cutting, 94 U. S. 14, 22;

Credits Commutation Co. v. *U. S.,* 177 U. S. 311, 315;

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578, 581;

In re Engelhard, 231 U. S. 646, 651;

City of New York v. *Consolidated Gas Co.,* 253 U. S. 219;

City of New York v. *New York Telephone Co.,* 261 U. S. 312.

7. **No claim in court below that intervention was a matter of right.**

So far as appears from the papers filed by the appellant with the District Court, and from the oral arguments in

support of its application to intervene, the court received no intimation that the appellant was asserting a right, but obviously understood that permission to intervene was asked, as a matter of discretion.

The notice of motion (R. 55) stated that the appellant would move for an order "permitting Allen Calculators, Inc., to intervene herein upon the ground that the intervenor is engaged in commerce between the states and with foreign nations in adding machines, bookkeeping machines, calculators and cash register combinations, and that the proposed acquistion by National Cash Register Company of the stock in Allen-Wales Adding Machine Corporation will materially and unreasonably restrain interstate and international commerce in such articles of commerce and will tend to create a monopoly in National Cash Register Company in respect of such articles of commerce."

The appellant's proposed answer (R. 56-64) contained factual allegations and much argumentative and conclusory matter elaborating on this theme. There was no mention of any of the grounds for intervention as of right specified in Rule 24(a), and particularly no statement to the effect that representation of the appellant's interest by the Government was or might be inadequate.

Rule 24(c) requires that a motion to intervene "shall state the grounds therefor". Since the motion papers filed by the appellant in the District Court did not state that intervention was claimed as a matter of right under Rule 24(a), but indicated that the court was being asked to permit intervention in the exercise of its discretion, there was a failure to comply with the requirements of Rule 24(c), and the claim that intervention was a matter of right should not be considered on this appeal.

In the oral argument on the question of intervention (R. 29 *et seq.*) counsel for appellant did not hint that intervention was claimed as a matter of right. The only authorities referred to by counsel for the appellant were the Clayton Act (R. 35), the applicability of which is not obvious, and the case of *United States* v. *Swift & Co.* (286

U. S. 106) (R. 33), in which intervention had been permitted by the District Court.

One of the assistants to the Attorney General, appearing for the Government, urged the court to grant the application for intervention under Rule 24(b)(2), on the ground that the intervenor had a claim or defense in common with that of the Government (R. 29-34). This was, of course, an argument addressed to the discretion of the court. In fact, everything that was said by counsel representing the Government on the question of intervention indicated that, in their opinion, the decision of that question was within the discretion of the court; and appellant's counsel clearly indicated that he was appealing to the court to exercise its discretion in his favor. As a result, before any evidence was introduced, the court permitted intervention "conditionally" (R. 30). At one point the court remarked (R. 33):

> "I will tell you—you see, you can advise with the Government and assist them in bringing out any points that you think will be helpful, but it just seems a little unusual in a matter between two private parties here, in which the Government intervenes, that you come in. I thought if you had some authorities—"

The following colloquy took place (R. 40):

> The Court (to Mr. Moyer): Have you any other witnesses?
>
> Mr. Moyer: We have no additional witnesses except Mr. Allen, unless Allen Calculators, Inc. is permitted to examine him first.
>
> The Court: If Allen Calculators, Inc. is not permitted to intervene will you call him as your witness?
>
> Mr. Moyer: What is the status of the intervenor at this time?
>
> The Court: I would say that the intervention was received conditionally this morning, and I don't see anything that developed here. This is an original proceeding by the United States against the National Cash Register Company, and we are passing on the decree which grew out of the litigation at that time between

those parties. I think it would be unreasonable at this time to—

Mr. Moyer: —I will call Mr. Allen.

Mr. Seasongood: I understand your Honor rules we are not permitted to intervene.

The Court: Yes. As I say, the original proceeding was between the United States Government and the National Cash Register Company, and we are just considering the decree growing out of that litigation, and it would be unreasonable at this late date to permit intervention by your client. So you may have an exception and take such other position as you would want to, and if you later want to file a brief as a friend of the Court I don't see that there is any objection to that.

Mr. Seasongood: Of course, we haven't had the right to cross-examine or any of the rights of a litigant in the case.

The Court: I understand, but occasionally the Court permits briefs to be filed without actually taking part in the case, but I think that is about as far as we can go."

Not having presented to the District Court the contention that intervention was a matter of right, this Court should not permit appellant to rely now on such contention.

Hormel v. *Helvering*, 312 U. S. 552, 556-9;

Helvering v. *Tex-Penn Oil Co.*, 300 U. S. 481, 498;

Washington v. *U. S.*, 87 Fed. 2d 421, 435 (C. C. A. 9).

If the claim that intervention was a matter of right, under Rule 24(a), had been asserted as a ground for intervention in the moving papers, or even if it had been made in the extended discussion and argument on the question of intervention in the lower court, National might well have considered the withdrawal of its opposition to intervention, if there appeared to be any merit in the claim. Therefore, it would be seriously prejudicial to the appellee to permit this contention to be raised, for the first time, on appeal.

SECOND

The action of the District Court in denying intervention was correct and involved no abuse of discretion.

The references hereinbefore made (*ante*, pp. 18-19) to the discussions which took place at the hearing between counsel and the court, on the subject of intervention, show that the District Court gave the matter careful and patient consideration and tried repeatedly, but without success, to elicit from appellant's counsel some good reason why intervention should be permitted.

The court obviously was unable to discover that appellant had anything to offer, either by way of evidence or legal argument, having any bearing on the issues, which had not been raised by the Government and thoroughly presented.

The answer filed by the Government specifically raised the point, dwelt on at considerable length in appellant's brief, that the cash-drawer and bookkeeping machines of the Allen-Wales Corporation were a recent development and that, after the war emergency, there would be a wide potential market for such products and they would be in direct and substantial competition with products of National (R. 14). The Government's answer also specifically raised the question of "potential competition" in adding machines between National and Allen-Wales, because of the ability of the former to enter that field without acquiring the stock of the latter and the likelihood that it would do so after the war (R. 14-15).

The Government's answer also asserted that the acquisition sought by National would not be in the public interest because of its effect on "independent" dealers and distributors and on competition in business machines and office equipment "at the distribution level" and, generally, that the acquisition would have the same effect of limiting competition and prospective competition as many of the

practices referred to in the petition filed by the Government in the original anti-trust suit against National, and would not be consistent with the purpose of the final decree entered therein (R. 16).

All these points were gone into at great length at the hearing by the attorneys representing the Government, through cross-examination of witnesses and the presentation and discussion of the numerous exhibits, and were strongly urged in argument.

In the record on this appeal, we designated for printing only a small part of the complete record of the proceedings in the District Court, because we did not wish to burden this Court with voluminous exhibits and testimony. They were relevant to the issues in the court below, but would seem to have only a remote bearing on the question of appellant's intervention. It is, therefore, not possible, by reference to this record on appeal, to direct the attention of the Court to the very thorough manner in which every fact was presented which could have any possible bearing on whether the acquisition of Allen-Wales by National would violate, or be inconsistent with, the provisions of the decree or the anti-trust laws. It is believed, however, that the record contains enough material to show that there was a very complete and exhaustive hearing in the District Court on the question under consideration.

The testimony of Mr. Ralph C. Allen, President of the appellant, Allen Calculators, Inc., appears in the record (R. 75-83) and is in itself sufficient to demonstrate that the action of the District Court in denying formal intervention to his company was entirely correct and reasonable and a sound exercise of the court's discretion. This testimony shows that what the appellant was really concerned with was, not that the acquisition of Allen-Wales by National would lessen competition, but that the appellant would have a stronger competitor to meet in the adding machine business. National has never been in the adding machine field, whereas the principal business of both the appellant

and Allen-Wales has been adding machines, so that they are in direct competition with each other. The following excerpt from Mr. Allen's cross-examination is illuminating on this point (R. 82-83):

"Q. Tell us why you are so interested in the fate of the distributors of the Allen-Wales Company.

A. I am not particularly interested in the distributors of the Allen-Wales Company.

Q. What position do you hold in the Allen Calculators? • • • You are president of the company?

A. Yes.

Q. And that is a competitor of Allen-Wales?

A. Very much so.

Q. And if Allen-Wales, by reason of purchase by National Cash, got a wider distribution and stronger backing, it would naturally furnish stronger competition to your company than in the hands of the Allen-Wales Company?

A. Yes—I don't know.

• • • • • •

Q. Aren't you afraid, or isn't your company afraid of National Cash Register Company coming into the adding machine field?

A. I don't know as I am afraid.

Q. You are not glad to hear that they are coming in, are you?

A. I don't know that it excites me particularly.

Q. Well, didn't you have a petition filed here to try to stop it?

A. I think for the good of the independents the deal should be stopped.

Q. It is for the good of the independents you filed this?

A. No, I did not say that. I said I believe that the independents would be benefitted if the deal doesn't go through.

Q. You believe that you would be benefitted too, don't you?

A. I don't admit that. I probably will.

Q. Did you file this petition for the benefit of independents?

A. No. That is for our company."

It also developed, in the course of Mr. Allen's testimony, that he had at one time been president of Allen-Wales and was released from its service and now has a lawsuit pending against one of the stockholders who purchased the business, about stock to which he claimed to be entitled (R. 80-81).

This circumstance may have had some bearing, in the mind of the District Judge, on the question of the real motive for intervention by this single one of eight companies in the adding machine business, and on the court's final conclusion that the public interest and that of the "independents" would be adequately protected by the Government.

If appellant's counsel had any evidence or points of law material to the issues, they had ample opportunity to confer with counsel for the Government before and during the hearing. Before announcing his conclusion that intervention should be denied, the District Judge made certain that Mr. R. C. Allen, President of the appellant, would be called as a witness by the Government (R. 40). He evidently was satisfied that nothing else could be brought out by appellant's counsel which had not been covered fully in the Government's case.

THIRD

Jurisdiction is lacking because the order denying intervention was not appealable.

The proceeding in the District Court was in a suit in equity brought by the United States against the appellee, The National Cash Register Company and others, under the

Sherman Anti-Trust Law (Act of July 2, 1890, ch. 647, as amended). Therefore, under the provisions of the Expediting Law of February 11, 1903 (U. S. C. A. Title 15, Sec. 29) no appeal can be taken except to the Supreme Court from a final decree of the District Court. An order denying intervention to a person not a party to such a suit, unless intervention is a matter of right, is not a final decree and is not appealable, either to the Supreme Court or to the Circuit Court of Appeals.

United States v. *California Cooperative Canneries*, 279 U. S. 553;

Missouri-Kansas Pipe Line Co. v. *United States, et al.*, 108 Fed. (2d) 614; certiorari denied, 309 U. S. 687.

In the *California Canneries* case, the Supreme Court of the District of Columbia had denied leave to California Cooperative Canneries to intervene in a proceeding in that court to vacate a consent decree previously entered in an anti-trust suit commenced by the United States; and Canneries appealed from that order to the Court of Appeals of the District of Columbia, which reversed the order. On certiorari to the Supreme Court, to review an order of the Court of Appeals refusing to set aside its order of reversal, the Supreme Court reversed, holding that the Court of Appeals had no jurisdiction to entertain the order denying intervention. In delivering the opinion of the court, Mr. Justice BRANDEIS said (pp. 558-9):

"* * * These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the Anti-Trust Act 'in which the United States is complainant,' the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see Collins *v.* Miller, 252 U. S. 364; and it precluded the possibility of an appeal to either court from

an interlocutory decree. • • • The purpose of Congress to expedite such suits would obviously be defeated if in the District of Columbia an appeal lay to the Court of Appeals from a denial of a motion for leave to intervene."

In the *Missouri-Kansas Pipe Line Co.* case, the Circuit Court of Appeals, Third Circuit, dismissed appeals from orders of the District Court of Delaware, denying motions to intervene in proceedings in an anti-trust suit, relying on the decision of the Supreme Court in the *California Cooperative Canneries* case, and this Court denied certiorari (309 U. S. 687).

The appellant cites the decision of this Court in *Missouri-Kansas Pipe Line Co.* v. *United States* (312 U. S. 502), as establishing a different rule from these cases with respect to the appealability of an order denying intervention. That decision was discussed in an earlier Point in this brief (*ante*, pp. 14-15), where it was pointed out that the decision was based on the rights specifically conferred on the Panhandle Eastern Pipe Line Company by the decree, and on the provision in the decree that it could become a party to the suit for the purpose of enforcing those rights. This Court did not question the general rule that orders denying intervention are not appealable and did not overrule its decisions in the *Canneries* case or in the earlier appeal of Mokan from an order denying its application to intervene on its own behalf, in which this court denied certiorari (309 U. S. 687).

The application of the appellant to intervene in this case was within the discretion of the District Court. Therefore, the general rule that orders denying intervention are not appealable applies.

Ex parte Leaf Tobacco Board of Trade, 222 U. S. 578, 581.

FOURTH

Some comments on appellant's brief.

I. A considerable part of appellant's brief is devoted to an argument on the merits of the application of National for permission to acquire the stock of Allen-Wales and the correctness of the order of the District Court granting such permission, under certain conditions (See, pp. 28-34).

Only a small portion of the record of proceedings in the court below is contained in the record on this appeal; and it is entirely out of place to argue the merits of the issues presented in those proceedings on this record. The petition which was filed by National (R. 6-12), the answer filed by the Government (R. 14-17), the order of the District Court filed on December 7, 1943 (R. 17-22), together with the opening statement of counsel for National (R. 65-72, 74), and the extracts from the opening statement of the Assistant to the Attorney General (R. 72-4) and his closing argument (R. 85-104) show that all the reasons now suggested by the appellant for denying the petition of National were fully presented and carefully weighed.

It is not true that the attorneys for the Government failed to emphasize the possible interference with "potential" competition as well as the lessening of existing competition (Appellant's Brief, pp. 8-9, 21, 29). It is true, as mentioned in appellant's brief (pp. 7, 29-30), that counsel for National, in the court below, argued that the principal, and practically the only, issue was the effect of the proposed acquisition on competition between the buyer and the seller and that substantial competition between them must be shown to exist. We believe that was and is a correct statement of the law and was not a "narrow" construction either of the anti-trust statutes or the decree. However, the Government took a very different position on the question of competition; and the District Court gave weight to the Government's contention, as shown by the conditions imposed on National in its order.

II. It is implied, in appellant's brief (pp. 4, 13, 16, 29), that National was not asked by the Government or by the court to make any showing that the acquisition by it of the Allen-Wales Corporation would "supplement the plant, patents, machines and facilities of the petitioner" and that this point was raised only by appellant.

As a matter of fact, this was expressly alleged in the petition (R. 11) and was found in the order (R. 19), and a large part of the testimony and physical exhibits introduced by the petitioner were designed to, and did, show how adding machines differed from the products heretofore manufactured and sold by National and how the addition of such machines would supplement its business.

III. In criticizing the Department of Justice for introducing letters from Allen-Wales dealers and distributors, instead of calling them as witnesses or taking their depositions, the appellant implies that the introduction of these letters constituted the entire case presented by the Government (Brief, pp. 6, 22).

That was not the fact. A large amount of evidence was, of course, introduced by the petitioner, since it had the burden of establishing the allegations in its petition. The material which had been gathered by the petitioner and which had been previously submitted to the Department of Justice, included numerous charts and tables, covering the entire field of manufacture and distribution of cash registers, accounting machines, adding machines and other business machines, which the attorneys for the Government, as well as the attorneys for the petitioner, made full use of in presenting all relevant facts and arguments to the court. The attorneys for the Government cross-examined at length the witnesses called by National, who were obviously the persons most familiar with the relevant facts, and also offered numerous exhibits on behalf of the Government, which had been collected and prepared in the course of the Anti-Trust Division's painstaking preparation for the hearing, over a period of several months.

IV. The brief (pp. 12-13) refers to various statements contained in appellant's proposed answer, as though they were facts, though most of them were completely disproved by the evidence adduced at the hearing. Among these is the statement (Brief, p. 12, R. 58) that National plans to withdraw the manufacturing plant of Allen-Wales from Ithaca, N. Y. and incorporate it into its plant at Dayton, thereby disturbing the relationship of some four hundred employees in the Ithaca plant and the course of commerce from New York. Appellant complains that "this direct challenge of the purpose for which Cash was seeking acquisition and the statement of absorption and dislocation do not appear in the answer filed by the Government".

No such statement appeared in the Government's answer, because the Anti-Trust Division knew that it was not true; and the testimony at the hearing established the contrary.

V. Appellant's brief contains a statement (p. 32) supported by nothing except its own assertion in the answer it proposed to file, that no conditions in the order permitting the acquisition of the Allen-Wales Corporation would safeguard "independent dealers", "in view of Cash's great size, practical monopoly, and history of relentless suppression of competition". The brief contains numerous other references to appellee's "past wrongdoings", its size and its "still continuing monopoly" (pp. 15, 22, 30-1).

The final decree in the Government's anti-trust suit against National was entered more than twenty-eight years ago and contained elaborate provisions for the protection of competitors and the public. It required the defendants to pursue a straight and narrow path so far as matters of competition and monopoly were concerned. There is nothing to indicate that National has ever violated the provisions of that decree; and a good conduct record of twenty-eight years entitles it to ask that the charges made against it by the Government in 1911 should not be exhumed today.

VI. The impression is also sought to be conveyed by appellant's brief (pp. 15, 18, 22) that National, in the pro-

ceedings in the District Court, was seeking a "modification" of the final decree of February 1, 1916.

On the contrary, what it was doing was to follow a procedure expressly authorized by the decree in order to acquire, with the permission of the court, the stock of another corporation, for the purpose of supplementing its business and facilities, on a showing that such acquisition would not substantially lessen competition. The prohibition in the decree was not absolute, but was qualified by the provision that permission to make such enjoined acquisitions could be obtained under certain circumstances.

Counsel for the Government argued (R. 38), as does counsel for appellant (p. 16), that the prohibition in the decree goes further than the provisions of the anti-trust laws and requires National to make a showing of the propriety of any desired acquisition, which would not otherwise be necessary. We agree with that contention to the extent that National applied to the court for permission to acquire Allen-Wales only because of the provisions of the decree. There would have been no violation of the anti-trust laws in the acquisition of Allen-Wales by National, in the absence of the decree.

However, we definitely do not agree to the statement in appellant's brief (pp. 31-2) that the burden of proof was on National to show:

> "1. The danger from acquisition of competitors guarded against by injunction in the 1916 decree no longer existed, and
>
> 2. Under existing conditions it would be a grievous wrong to Cash if it were not permitted to acquire Allen-Wales."

The 1916 decree can be searched in vain for any such requirements.

VII. Appellant's brief (pp. 10-11, 14, 28) refers to, but does not argue at length, the second and third assignments of error, presented on this appeal, namely (2) the with-

drawal by the District Court of leave to the appellant to intervene conditionally, which it had theretofore granted, and (3) its alleged failure to enter an order "in conformity with its decision in refusing leave to intervene" (R. 24).

(a) As to the second assignment of error, unless intervention was a matter of right, the court, in the exercise of its discretion, was not obliged to permit intervention, either conditionally or unconditionally. The court did, in the exercise of its discretion, originally permit "conditional" intervention, which enabled the appellant to take some part in the proceedings on the first day of the hearing. Later on, the court simply ruled that the appellant would not be permitted to intervene. The appellant was certainly put in no worse position by being allowed conditional intervention during part of the hearing than it would have been in had intervention been denied at the outset.

(b) The point of the third assignment of error seems to be that the District Court was under some obligation to state reasons, or rather, a single reason, in its order denying intervention (Brief, pp. 10-11).

The court entered a short order, overruling the motion of the appellant for leave to intervene, without stating any reasons therein (R. 6), having indicated that it did not deem it fair to be confined to a single ground for denying intervention (R. 43). Counsel for the appellee had pointed out that there might be numerous other reasons for such discretionary action (R. 41-2).

The remarks of the learned District Judge on the question of intervention, which appear in the record (R. 30, 32-3, 35-6, 40-3), show that he finally reached the conclusion that intervention should be denied for several reasons, particularly because all possible objections to granting the petition had been fully presented by the Government, which had adequately represented the "independents" and the public interest generally.

and because formal intervention would contribute nothing to the proceeding but might result in undue delay and prejudice the interests, not only of National, but of the sellers of Allen-Wales stock. Those sellers were not parties to the proceeding and were not represented by counsel, although the president of appellant was engaged in private litigation with one of them (R. 80-81).

It is a novel proposition that a formal order of this kind should be reversed merely because it does not state the reasons for making it. Of course, no authorities can be cited for such a proposition; and it is untenable.

FIFTH

The order appealed from should be affirmed or the appeal should be dismissed for lack of jurisdiction.

Respectfully submitted,

Washington, March 21, 1944.

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